turns upon a calendar year basis when they should have been made upon a fiscal year basis. The petitioner contends that the payments made on the calendar year returns should be allocated to the fiscal year tax due in proportion to the number of months of the calendar year contained in the fiscal year. This method received the approval of the Board of Tax Appeals in *Paso Robles Mercantile Co.* v. *Commissioner*, 12 B. T. A. 750, in *Paso Robles Mercantile Co.* v. *Commissioner*, 18 B. T. A. 415, and *Bradstreet Company of Maine* v. *Commissioner*, 23 B. T. A. 1093, although some inconsistency with these holdings appears in the opinion of the Board in *W. H. Hill Co.* v. *Commissioner*, 23 B. T. A. 605. The decision of the Board in the first *Paso Robles Mercantile Company* case, *supra*, was affirmed by the Circuit Court of Appeals for the Ninth Circuit (33 F. (2d) 653), and this Court denied certiorari (280 U. S. 595). Although the method of allocating payments under an erroneous calendar year return to the proper fiscal year was not presented to the Circuit Court of Appeals, or to this Court on petition for certiorari, the Circuit Court of Appeals held that the statute of limitations did not commence to run against the Commissioner's reassessment upon a fiscal year basis until calendar year returns covering the entire fiscal year had been filed. The reasoning of the court in reaching this conclusion appears to be in conflict with the reasoning of the court below in the instant case.

The Commissioner's method of allocation has been upheld by the Court of Claims in the present case and in *Mann* v. *United States*, 44 F. (2d) 1005. On June 1, 1931, this Court denied certiorari in *Mann* v. *United States*, No. 875, October Term, 1930, but the Government in its brief in opposition relied wholly upon the fact that the taxpayer's claim for refund was not filed in time, even if the Commissioner's allocation were not deemed correct.

The situation is one which apparently was not contemplated and for which no provision is made by statute or regulation. We believe that while the question is close, persuasive argument can be made that the Commissioner's method of allocation is not unreasonable and therefore should be sustained. Furthermore, it is to be noticed that the taxpayer is claiming a refund for the taxable year 1920, although it has at no time paid any tax on any return filed for either the calendar year 1920 or the fiscal year ending June 30, 1920.

II

A further question will remain even if it should be decided that the petitioner's contentions as to the proper allocation of the tax payments are correct.

Section 284 (b) (1) of the Revenue Act of 1926 (*infra*, p. 12) provides that no refund shall be made

> after four years from the time the tax was paid * * * unless before the expiration of such period a claim therefor is filed by

> the taxpayer [with certain exceptions not here important].

It is further provided, in Section 284 (h) of the Revenue Act of 1926 (*infra*, p. 13) that the provisions of Section 284 shall not

> bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expiration of five years after the date the return was due.

The petitioner paid the sum of $1,113,509.41 during the year 1920. The final payment of this sum was made on December 24, 1920. (R. 21.) It is part of this sum which the petitioner is now seeking to recover. The claim for refund upon which the petitioner now relies was not filed until September 15, 1925 (R. 23), more than four years after the payment was made. Thus, since the claim was filed more than four years after the tax was paid, recovery can not be had under Section 284 (b) (1) of the Revenue Act of 1926, *supra*.[8]

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[8] Moreover, the taxpayer can not succeed by virtue of the following provision in Section 284 (g) of the Revenue Act of 1926:

> If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid.

Although a claim for refund was filed before April 1, 1927, the waiver which the taxpayer filed in respect of the taxable year 1920 was not filed until December 15, 1926. (R. 23.) The provisions of Section 284 (g), *supra*, apply only if the waiver was filed before June 15, 1926.

Consequently there can be no recovery unless the claim is within Section 284 (h) of the Revenue Act of 1926, *supra*, which allows recovery if the claim for refund was filed "before the expiration of five years after the date the return was due." The money which the petitioner seeks to have refunded to it was money paid under a return for the calendar year 1919. Returns for that calendar year were due on March 15, 1920. Section 227 (a) of the Revenue Act of 1918 (*infra*, p. 12). If this is "the return" within the meaning of Section 284 (h) of the Revenue Act of 1926, the claim for refund which the petitioner filed on September 15, 1925, was clearly not filed in time.

But it may be contended that "the return" within the meaning of Section 284 (h) is the return which the taxpayer should have made; that is, a return for the fiscal year ended June 30, 1920. This return was due September 15, 1920, and if this is "the return" the claim for refund filed September 15, 1925, was filed within the five-year period. *Burnet v. Willingham Loan & Trust Co.*, 282 U. S. 437.

CONCLUSION

The record in this case discloses that the United States has been overpaid a substantial sum of money for taxes. The Commissioner's allocation of payments to the fiscal year ending June 30, 1918, resulted in an overpayment of $443,367.61, which could not be recovered because it was too late to file a claim for refund when the allocation was

made. This overpayment is not involved in this suit, but the Commissioner's refusal to allocate any of the payments to the fiscal year ending June 30, 1920, has defeated the petitioner's claim of overpayment in that year. The method of allocation adopted by the Commissioner, and approved in the court below, can not be said to be entirely free from doubt. Nor is it entirely clear that the petitioner's claim for refund filed September 15, 1925, was too late.

Under all the circumstances of this case, the United States, without confessing error or conceding any of the petitioner's contentions, and reserving all questions for hearing in this Court, does not oppose the granting of the writ.

Respectfully submitted.

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SEPTEMBER, 1931.

APPENDIX

STATUTES INVOLVED

The Revenue Act of 1918, c. 18, 40 Stat. 1057, 1058, 1064, 1075, provides in part:

> SEC. 200. That when used in this title—
>
> The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or section 232. The term "fiscal year" means an accounting period of twelve months ending on the last day of any month other than December. The first taxable year to be called the taxable year 1918 shall be the calendar year 1918 or any fiscal year ending during the calendar year 1918; * * *.
>
> SEC. 212. (a) That in the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by section 214.
>
> (b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual account-

ing period is other than a fiscal year as defined in section 200 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the Commissioner, be computed on the basis of such new accounting period, subject to the provisions of section 226.

SEC. 227. (a) That returns shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the fifteenth day of March. The Commissioner may grant a reasonable extension of time for filing returns whenever in his judgment good cause exists and shall keep a record of every such extension and the reason therefor. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months.

Section 284 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 66, 68, provides in part as follows:

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

* * * * *

(h) Except as provided in subdivision (d) this section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, or (2) bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expiration of five years after the date the return was due.

U. S. GOVERNMENT PRINTING OFFICE: 1921